

under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.³² Industry data indicate that 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.³³ Thus, under this standard, most cable systems are small.

14. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."³⁴ There are approximately 65.4 million cable subscribers in the United States today.³⁵ Accordingly, an operator serving fewer than 654,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.³⁶ Based on available data, we find that the number of cable operators serving 654,000 subscribers or less totals approximately 7,916.³⁷ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.³⁸ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

15. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution.³⁹ This definition provides that a

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7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 400,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

³² 47 C.F.R. § 76.901(c).

³³ Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

³⁴ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

³⁵ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report*, 21 FCC Rcd 2503, 2507, ¶ 10 and 2617, Table B-1 (2006) ("12th Annual Report").

³⁶ 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

³⁷ 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Commc'ns News eds., 2006); Top 25 MSOs – NCTA.com, available at <http://www.ncta.com/ContentView.aspx?contentId=73> (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 654,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

³⁸ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.909(b).

³⁹ 13 C.F.R. § 121.201 (2002 NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program (continued....)

small entity is one with \$13.5 million or less in annual receipts.⁴⁰ Currently, three operators provide DBS service, which requires a great investment of capital for operation: DIRECTV, EchoStar (marketed as the DISH Network), and Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel).⁴¹ All three currently offer subscription services. Two of these three DBS operators, DIRECTV⁴² and EchoStar Communications Corporation ("EchoStar"),⁴³ report annual revenues that are in excess of the threshold for a small business. The third DBS operator, Dominion's Sky Angel service, serves fewer than one million subscribers and provides 20 family and religion-oriented channels.⁴⁴ Dominion does not report its annual revenues. The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we recognize the possibility that there are entrants in this field that may not yet have generated \$13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

16. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entities are defined as all such companies generating \$13.5 million or less in annual receipts.⁴⁵ Currently, there are approximately 150 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.⁴⁶ Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately one million subscribers.⁴⁷ Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators.

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Distribution (2002 NAISC Code 517510). See "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

⁴⁰ 13 C.F.R. § 121.201 (2002 NAICS code 517510).

⁴¹ See *12th Annual Report*, 21 FCC Rcd at 2538-39, ¶ 70 and 2620, Table B-3.

⁴² DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 15.72 million subscribers nationwide as of June 2005. See *12th Annual Report*, 21 FCC Rcd at 2620, Table B-3.

⁴³ EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and one of the four largest MVPDs, serving an estimated 12.27 million subscribers nationwide. *Id.*

⁴⁴ See *id.* at 2540, ¶ 73.

⁴⁵ 13 C.F.R. § 121.201 (2002 NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). See "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

⁴⁶ See *12th Annual Report*, 21 FCC Rcd at 2564-65, ¶ 130. Previously, the Commission reported that IMCC had 250 members; see *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report*, 19 FCC Rcd 1606, 1666, ¶ 90 (2004) ("*10th Annual Report*").

⁴⁷ See *12th Annual Report*, 21 FCC Rcd at 2564-65, ¶ 130.

Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCO may qualify as small entities.

17. *Home Satellite Dish ("HSD") Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating \$13.5 million or less in revenue annually.⁴⁸ HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2004 and June 2005, HSD subscribership fell from 335,766 subscribers to 206,358 subscribers, a decline of more than 38 percent.⁴⁹ The Commission has no information regarding the annual revenue of the four C-Band distributors.

18. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service comprises Multichannel Multipoint Distribution Service (MMDS) systems and Multipoint Distribution Service (MDS).⁵⁰ MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of MDS and Educational Broadband Service (EBS) (formerly known as Instructional Television Fixed Service (ITFS)).⁵¹ We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating \$13.5 million in annual receipts, appears applicable to MDS and ITFS.⁵²

19. The Commission has also defined small MDS (now BRS) entities in the context of Commission license auctions. For purposes of the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.⁵³ This definition of a small entity in the context of MDS auctions has been approved by

⁴⁸ 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). See "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

⁴⁹ See 12th Annual Report, 21 FCC Rcd at 2617, Table B-1. HSD subscribership declined more than 33 percent between June 2003 and June 2004. See *id.*

⁵⁰ Amendment of Parts 1, 21.73, 74, and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66, RM-10586, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004).

⁵¹ See *id.*

⁵² As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). See "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

⁵³ 47 C.F.R. § 21.961(b)(1) (2002).

the SBA.⁵⁴ In the MDS auction, 67 bidders won 493 licenses.⁵⁵ Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities.⁵⁶ MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution, which includes all such entities that do not generate revenue in excess of \$13.5 million annually.⁵⁷ Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

20. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).⁵⁸ We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

21. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.⁵⁹ The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating \$13.5 million in annual receipts, appears applicable to LMDS.⁶⁰ The Commission has also defined small LMDS entities in the context of Commission license auctions. In the 1998 and 1999 LMDS auctions,⁶¹ the Commission defined a small business as an entity

⁵⁴ *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, Report and Order*, 10 FCC Rcd 9589 (1995).

⁵⁵ MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996 (67 bidders won 493 licenses).

⁵⁶ Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of \$13.5 million or less). See 13 C.F.R. § 121.201 (2007 NAICS code 517910).

⁵⁷ 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). See "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

⁵⁸ In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

⁵⁹ See *Local Multipoint Distribution Service, Second Report and Order*, 12 FCC Rcd 12545 (1997).

⁶⁰ As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). See "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

⁶¹ The Commission has held two LMDS auctions: Auction No. 17 and Auction No. 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998 (104 bidders won 864 licenses). Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999 (40 bidders won 161 licenses).

that had annual average gross revenues of less than \$40 million in the previous three calendar years.⁶² Moreover, the Commission added an additional classification for a “very small business,” which was defined as an entity that had annual average gross revenues of less than \$15 million in the previous three calendar years.⁶³ These definitions of “small business” and “very small business” in the context of the LMDS auctions have been approved by the SBA.⁶⁴ In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission’s auction rules.

22. *Open Video Systems (“OVS”).* The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,⁶⁵ OVS falls within the SBA-recognized definition of Cable and Other Program Distribution Services, which provides that a small entity is one with \$13.5 million or less in annual receipts.⁶⁶ The Commission has approved approximately 120 OVS certifications with some OVS operators now providing service.⁶⁷ Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2005, BSPs served approximately 1.4 million subscribers, representing 1.49 percent of all MVPD households.⁶⁸ Among BSPs, however, those operating under the OVS framework are in the minority.⁶⁹ As of June 2005, RCN Corporation is the largest BSP and 14th largest MVPD, serving approximately 371,000 subscribers.⁷⁰ RCN received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

⁶² See *LMDS Order*, 12 FCC Rcd at 12545.

⁶³ *Id.*

⁶⁴ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC from A. Alvarez, Administrator, SBA (January 6, 1998).

⁶⁵ See 47 U.S.C. § 573.

⁶⁶ 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines “Wired Telecommunications Carriers” (2007 NAISC Code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC Code 517510). See “2007 NAICS U.S. Matched to 2002 NAICS U.S.” (available at <http://www.census.gov/naics/2007/n07-n02.xls>).

⁶⁷ See Current Filings for Certification of Open Video Systems, <http://www.fcc.gov/mb/ovs/csovsccer.html> (last visited July 25, 2007); Current Filings for Certification of Open Video Systems, <http://www.fcc.gov/mb/ovs/csovsarc.html> (last visited July 25, 2007).

⁶⁸ See 12th Annual Report, 21 FCC Rcd at 2617, Table B-1.

⁶⁹ OPASTCO reports that less than 8 percent of its members provide service under OVS certification. See *id.* at 2548-49, ¶ 88 n.336.

⁷⁰ See *id.* at 2549, ¶ 89. WideOpenWest is the second largest BSP and 16th largest MVPD, with cable systems serving about 292,500 subscribers as of June 2005. See *id.* The third largest BSP is Knology, which was serving approximately 179,800 subscribers as of June 2005. See *id.*

23. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."⁷¹ The SBA has developed a small business size standard for firms within this category, which is all firms with \$13.5 million or less in annual receipts.⁷² According to Census Bureau data for 2002, there were 270 firms in this category that operated for the entire year.⁷³ Of this total, 217 firms had annual receipts of under \$10 million and 13 firms had annual receipts of \$10 million to \$24,999,999.⁷⁴ Thus, under this category and associated small business size standard, the majority of firms can be considered small.

24. *Small Incumbent Local Exchange Carriers.* We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."⁷⁵ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.⁷⁶ We have therefore included small incumbent local exchange carriers in this RFA, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

25. *Incumbent Local Exchange Carriers ("LECs").* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁷⁷ According to Commission data,⁷⁸ 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses.

⁷¹ U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; <http://www.census.gov/naics/2007/def/ND515210.HTM#N515210>.

⁷² 13 C.F.R. § 121.201 (NAICS code 515210).

⁷³ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 515210) (issued November 2005).

⁷⁴ *Id.* An additional 40 firms had annual receipts of \$25 million or more.

⁷⁵ 15 U.S.C. § 632.

⁷⁶ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

⁷⁷ 13 C.F.R. § 121.201 (2007 NAICS code 517110).

⁷⁸ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (February 2007) ("Trends in Telephone Service"). This source uses data that are current as of October 20, 2005.

26. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), Shared-Tenant Service Providers,* and *Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁷⁹ According to Commission data,⁸⁰ 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are “Shared-Tenant Service Providers,” and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are “Other Local Service Providers.” Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities.

27. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: “This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer.”⁸¹ The SBA has developed a small business size standard for firms in this category: “A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.”⁸² According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year.⁸³ Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

D. Description of Reporting, Recordkeeping and other Compliance Requirements

28. The rules adopted in the *Report and Order* will impose additional reporting, recordkeeping, and compliance requirements on complainants and respondents in program access disputes by (i) codifying the requirements that a respondent in a program access complaint proceeding who expressly relies upon a document in asserting a defense must include the document as part of its answer; and (ii) finding that in the context of a complaint proceeding, it would be unreasonable for a respondent

⁷⁹ 13 C.F.R. § 121.201 (2007 NAICS code 517110).

⁸⁰ See Trends in Telephone Service at Table 5.3.

⁸¹ U.S. Census Bureau, 2007 NAICS Definitions, “2211 Electric Power Generation, Transmission and Distribution”; <http://www.census.gov/naics/2007/def/NDEF221.HTM#N2211>.

⁸² 13 C.F.R. § 121.201 (2007 NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, footnote 1).

⁸³ U.S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (2007 NAICS codes 221111, 221112, 221113, 221119, 221121, 221122) (issued November 2005).

not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute.

E. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered

29. The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁸⁴

30. The *Notice* invited comment on issues that had the potential to have significant economic impact on some small entities, including (i) whether the exclusive contract prohibition remains necessary to preserve and protect competition in the video distribution market; and (ii) whether and how our procedures for resolving program access disputes under Section 628 should be modified.

31. *Extension of Exclusive Contract Prohibition.* As discussed in Section A, the decision to extend the exclusive contract prohibition for five years will facilitate competition in the video distribution market by ensuring that competitive MVPDs continue to have access to the programming they need to compete. The decision therefore confers benefits upon various competitive MVPDs, including those that are smaller entities. Moreover, the decision avoids the adverse impact to smaller entities that the SBA Office of Advocacy Office and others stated would occur if the prohibition were to sunset.⁸⁵ Therefore, we conclude that our decision to retain the exclusive contract prohibition set forth in Section 628(c)(2)(D) benefits smaller entities as well as larger entities. The alternative of allowing the exclusive contract prohibition to expire would hinder competition in the video distribution market, thereby harming smaller entities.

32. *Modification of Program Access Complaint Procedures.* As discussed in Section A, the decision to modify the procedures for resolving program access disputes will facilitate the processing and resolution of program access complaints, thereby conferring benefits upon smaller entities as well as larger entities that seek to compete in the video distribution marketplace. The alternative of retaining the current program access complaint procedures would not facilitate the resolution of program access complaints and would thereby harm smaller entities that file such complaints.

F. Report to Congress

33. The Commission will send a copy of the *Report and Order and Notice of Proposed Rulemaking*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.⁸⁶ In addition, the Commission will send a copy of the *Report and Order and Notice of Proposed Rulemaking*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of

⁸⁴ 5 U.S.C. § 603(c).

⁸⁵ See SBA Office of Advocacy Comments at 4-7.

⁸⁶ See 5 U.S.C. § 801(a)(1)(A).

the *Report and Order and Notice of Proposed Rulemaking* and FRFA (or summaries thereof) will also be published in the Federal Register.⁸⁷

⁸⁷ See 5 U.S.C. § 604(b).

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 –Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition--Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*

Fostering greater competition in the market for the delivery of multichannel video programming is a primary and long-standing goal of federal communications policy. The program access rules, in particular the prohibition against exclusive contracts, have been instrumental in the growth of viable competitors in the multichannel video programming distribution (MVPD) market. Today we determine that while competition has improved, vertically integrated programmers still have an incentive and ability to favor their affiliated cable operators over competitive MVPDs. The item we adopt today ensures that the competition in this market will continue unabated by retaining the ban on exclusive contracts for vertically integrated programmers for another five years. We therefore make sure that new entrants, in addition to existing players, will continue to have access to critical programming on a nondiscriminatory basis.

Significantly, today's Order makes the program access complaint process more effective by requiring the production of the information necessary to fairly and objectively adjudicate a complaint. This expanded discovery will improve the quality and efficiency of the Commission's resolution of program access complaints. The availability of programmers' carriage contracts, subject to confidential treatment, is essential for determining whether the programmer is discriminating in price, terms, and conditions.

I am particularly pleased that the Commission has initiated an inquiry into the "tying" practices of programmers. Broadcast and cable programmers routinely tie marquee programming, such as premium channels or regional sports programming, with unwanted or less desirable programming. The Commission seeks comment on whether to end these practices by requiring programmers to offer channels to MVPDs on a stand-alone basis. I believe that if a cable operator only wants one channel, it should not have to take 10 or 20 channels in order to get that one. This is a particularly important issue for small and rural MVPDs and can be a significant obstacle to becoming a viable competitor in the MVPD market. And, I am also concerned about the impact the tying of channels has on consumers who ultimately bear the costs of unwanted programming in the form of higher prices.

Consumers have seen their cable bills double over the last decade at the same time the costs for all other communications services have declined. I take cable operators at their word when they point to the increased cost of programming as the reason for the increased cost borne by consumers. As the Commission begins its examination of these tying arrangements we should bear in mind their impact on consumers in terms of prices and program choice.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
APPROVING IN PART, AND CONCURRING IN PART**

Re: In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements

The program access rules are one of the true success stories of the 1992 Cable Act. It is no exaggeration to say that without these rules, the DBS industry as we know it would not exist. Cable operators still have the incentive and ability to discriminate against their competitors regarding access to affiliated programming. Access to cable-affiliated programming was—and continues to be—vital for the growth of a competitive marketplace. New entrants unanimously remind us of this and today the Commission once again unanimously so concludes.

The Commission will look at the exclusivity ban in another five years. I cannot say with certainty what the marketplace will look like in 2012 and whether the exclusivity ban can safely be sunset. I do know it cannot be permitted to do so in 2007. In this regard, I would not have raised the possibility of shortening the term of extension in markets where new entrants are gaining a foothold. It seems to me that this is *precisely* the time that an incumbent's incentive to unfairly deny programming to a competitor is most acute.

On the "tying" issue, I would make two points. First, this is primarily about the imbalance in bargaining power when a small MVPD negotiates with large media programming conglomerates. But what this issue is really tied to, like so many other broadcast and cable issues, is media consolidation, and if we fail to view it as such we do serious injustice to the future of our nation's all-important media. There are huge imbalances in the media industry brought on by consolidation, and this Commission needs to understand these imbalances and interconnections and deal with them broadly and effectively. Second, I do not want to broadly inhibit broadcast stations from negotiating for carriage of their multicast signals in exchange for carriage of their main digital signal. Perhaps one day the industry and the Commission will get serious about the public interest obligations of DTV broadcasters and we can be talking about program that really serves the interests of localism, diversity and competition, but precluding negotiations about multicast programming that could ultimately serve the public interest may foreclose options that we may not really want to foreclose.

Finally, while I am generally in favor of ensuring that complainants at the Commission have the information they need to prove their case, I believe that the discovery procedures adopted in this item go too far, and, paradoxically, not far enough. They go too far in establishing a bare "relevance and control" standard for discovery requests with no apparent limits on requests that are duplicative or unduly burdensome. I fear that these rules will embroil the Commission in an endless stream of discovery disputes as the parties vie for competitive advantage. On the other hand, I believe the decision does not go far enough because if we are going to liberalize our discovery rules, it ought to apply to contexts beyond program access – such as cases dealing with petitions to deny broadcast station license renewals and transfers. I hope that parties in other disputes file waivers with the Commission asking for liberalized discovery. If sunshine is the best disinfectant, we ought to let the sun shine into every nook and cranny of the Commission.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition Report and Order; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements

Today, I am pleased to support a five-year extension of the Commission's program access rules, specifically the prohibition on exclusive contracts between vertically-integrated satellite cable or broadcast programmers and cable operators. These rules continue to be necessary to not only promote competition and diversity in the distribution of video programming, but to also encourage further investment in the deployment of broadband and other advanced services. Extending the program access rules truly promotes the twin goals of enhanced cable competition and accelerated broadband deployment.

As it turns out, video programming is a killer application that is driving broadband and indeed the entire communications industry. Almost 86 percent of U.S. households get their video programming from a multi-channel video programming distributor (MVPD). Competitive access to video programming, therefore, serves as an important incentive to entrepreneurs, from small businesses to major companies like Verizon, AT&T and Qwest, to enter the video delivery market, make substantial investments to upgrade their networks, and provide consumers with competitive video, voice and data bundled service offerings.

According to the Coalition for Competitive Access to Content, a leading group of competitive video providers, trade associations and consumer groups, video revenues represent between 35 and 55 percent of the total broadband networks revenues. Simply put, "video revenues are essential for the economic success of capital investment" in broadband networks.

I have always supported legally permissible, sustainable means to promote video competition and broadband deployment. Today's decision does just that. It ensures that some, though not all, cable programming will be available to competitive video providers on fair and non-discriminatory terms and conditions. It preserves the program access regime's recognition that product differentiation is a legitimate competitive tool, but the withholding of highly sought programming by a dominant provider leads to barriers of entry that harm competition, the industry and consumers.

As our most recent *Video Competition Report* shows, competition in video distribution and programming markets has intensified, and with the entry of local exchange carriers and other broadband providers, competition in certain areas will truly be robust. According to our *Report*, from 2001 to 2005, the number of cable subscribers, as a share of total MVPD subscribers, has decreased from 77 percent to 69 percent. Commensurately, DBS subscribership has increased from 18 percent to 27 percent. While the competitive presence of DBS has reduced cable's dominance, concentration remains a concern: the top four MVPDs serve 63 percent of all MVPD subscribers, up five percent from 2004. Program access and vertical integration remain major areas of concern.

The *Order* and *Further Notice* address these concerns by extending our program access rules and seeking comment on whether DBS should be subject to the program access rules. While the only vertically-integrated DBS provider currently complies with our access rules pursuant to a merger

condition,¹ we should examine whether the rules should apply, especially since our program access regime applies to cable and common carriers.

I believe that video distribution and the resultant revenue stream will continue to drive broadband deployment, which can benefit consumers and the free flow of information beyond the video marketplace. Consumers will benefit not only from more choices, better service and lower prices, but consumers also stand to gain from a more robust exchange in the marketplace of ideas.

I have long expressed grave concerns about the negative effects of media consolidation in this country, and have focused on the problems raised by growing vertical integration of programming and distribution. Vast new distribution networks promise to limit the ability of any vertically integrated conglomerates from imposing an economic, cultural or political agenda on the public with few alternative choices. I truly believe the benefits of video competition extend beyond the many typical advantages of competition that accrue to consumers, and can actually improve the health of our overall democracy.

One note of concern about this *Order* is the curious turn it takes in revising the discovery process. The Commission decides here it is unreasonable for a respondent not to produce on request all the relevant documents requested by the complainant without a clear discovery standard and a meaningful mediation process. The modification to our existing rules is surprising because, to date, there has not been a single instance where the Commission has requested documents that a party has refused to produce.

The *Order* provides no articulated basis in law, administrative policy or practice to justify such a radical change in Commission policy. The problem with the production of documents has not been a failure of our procedural rules; rather, it has been a failure of will – the Commission's will. It has taken the Commission, on average, seven months to resolve on the merits three out of the 13 complaints filed since December 1998 that the parties did not settle.

The persistent failure of this Commission to act on program access complaints and to request documents in a diligent manner will not be remedied by opening the floodgates to unfettered discovery. Nor will it lead to prompt resolution of access complaints. Indeed, this novel discovery scheme will inevitably frustrate the process and create inefficiency. While I certainly support improving the discovery process to expedite access to relevant documents, the *Order* goes further than warranted by the record in this proceeding.

In sum, the extension of our program access regime is urgently needed to facilitate emerging video competition. I am pleased we are doing so before the current regime expires, and thank my colleagues for working to make many needed improvements in this *Order*.

¹ Within the context of the pending Liberty Media/DIRECTV transaction, the applicants have expressed a willingness to continue compliance, pursuant to merger conditions in the *News/Hughes Memorandum Opinion and Order*. See *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473 (2004).

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

Re: In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, and Sunset of Exclusive Contract Prohibition Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements

One of this Commission's top priorities continues to be the development of a diversity of viewpoints. Such diversity can best be achieved when viewers have access to a variety of programming options. To encourage the development of new programming, and sustain the viability of current programming, we must encourage broadcasters, and cable and satellite operators, to offer viewers a broad array of content and voices.

This item extends the current ban on exclusive contracts between cable operators and satellite cable programming vendors, or satellite broadcast programming vendors, for five years. While much has changed in the world of cable programming, at the current time it is necessary to provide certainty to consumers that they will have access to a variety of necessary programming by banning exclusive contracts. By reviewing this issue again in five years, we allow ourselves the flexibility to respond to further changes in the programming market.

It should be our goal to see all disputes resolved as efficiently and impartially as possible. I look forward to reviewing the comments regarding whether we should make changes to our current process to fulfill these goals.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re: In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution; Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements

In this Order, we extend the prohibition on exclusive contracts between vertically integrated programming vendors and cable operators for satellite-delivered programming for five years, until October 5, 2012, given the ongoing need to preserve and protect competition and diversity in the distribution of video programming. Although the video distribution marketplace has changed significantly since enactment of the ban, because of increased consolidation in the cable industry and significant regional clustering of cable systems, the ban remains warranted. I am supporting the extension of the exclusivity ban to help further encourage competition in the video distribution market. More competition in a particular market obviates the need for regulation.

With respect to the Notice of Proposed Rulemaking that we launch here to examine negotiations in the marketplace for retransmission consent and programming carriage, I support seeking comment on the questions my colleagues have raised. That said, I want to make clear at the outset that I am concerned about the Commission venturing into what has long been squarely within the realm of the private sector. We should give careful consideration before we regulators take any action that may interfere with private contracts. And as always, we must pay careful attention to Congress' mandates and intentions with respect to these issues. I look forward to reviewing the comments from all interested parties.

Many thanks to the Bureau for the many late nights you have sacrificed on these and other matters.